



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Address: <http://opacnmi.com>

2nd Floor J. E. Tenorio Building, Middle Road

Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 1399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 234-6481
Fax: (670) 234-7812

IN RE APPEAL OF Mr. FELIPE Q. ATALIG
doing business as CASA DE FELIPE

PSS RFP 96-004
DECISION ON APPEAL

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal by Felipe Q. Atalig, doing business as Casa de Felipe (Casa), from the denial of his protest by the Commissioner of Education (Commissioner) pertaining to Public School System (PSS) Request for Proposal (RFP) 96-004. The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of the Public School System Procurement Regulations (PSSPR). Casa filed its appeal with OPA on August 28, 1996.

PSS RFP 96-004 was a solicitation of proposals from vendors for the operation of the PSS school breakfast and lunch program for the school year 1996-1997, with an option to renew based upon an annual review for a period up to four years. This RFP covered all the public and some private elementary, junior high, and high schools, as well as headstart centers on Saipan, Tinian, and Rota. Proposers on this RFP were allowed to submit proposals for all the school covered, or for just one or several of them. The proposals under this RFP were to be evaluated based on the following criteria: (1) bid price, (2) food service management qualifications, (3) adequacy of facilities, equipment and staff, (4) capability to produce, deliver and serve meals on site, (5) capability to maintain cafeteria premises in compliance with health standards, and (6) financial capabilities. The proposer who obtained the highest rating for each school would be awarded the contract for the breakfast and lunch program for that school.

The specifications for the RFP required the vendor(s) to prepare, deliver, and serve meals to the school site; collect meal revenue; and prepare and clean up the cafeteria. The awarded vendor's contract cost would be based on the number of meals served for breakfast and lunch at the preestablished rate per meal. The meals would be provided free of charge to predetermined eligible students. Other students would pay a certain fee for each meal served which would be collected by the vendor and then offset against the vendor's billings. The awarded vendor would be paid by PSS on a biweekly basis.

The RFP was advertised during the months of February and March 1996, and the opening of the proposals was conducted as scheduled on March 8, 1996 at 3:00 p.m. at the office of the PSS Procurement and Supply Officer. Five Saipan vendors submitted proposals to PSS

for the 22 schools on Saipan that were included in the RFP. The five proposers for Saipan schools consisted of: Casa de Felipe (Casa), Auntie Mag's Catering Services (Auntie Mag's), M.V. Reyes Catering Services (M.V. Reyes), Chamolinian Deli, and JCG Services. Other sets of vendors proposed for the schools in Tinian and Rota.

After receiving the proposals, the Proposal Evaluation Committee (Committee) met on April 1, 1996 to review the proposals and determine if required documents were submitted with the proposals. The review identified needed documents and information that should be submitted by the proposers under this RFP. Afterwards, the Committee conducted a site inspection by visiting the kitchen facilities of Chamolinian Deli, M.V. Reyes and Casa. The site inspection for JCG Services and Auntie Mag's was conducted on the following day. During the inspection, the Committee requested the additional documents and information needed from the proposers, and asked that these be submitted to PSS not later than April 8, 1996.

By memorandum dated April 17, 1996, the Committee completed its evaluation of the proposals and notified the Commissioner of the results. The evaluation result was approved by the Commissioner on April 24, 1996. Accordingly, PSS sent the "intent to award" letters to the successful proposers and notification letters to unsuccessful proposers on April 24, 1996. After receipt of its letter from PSS, Casa filed with the Commissioner on April 30, 1996 a notice of protest on its bid rejection for Tanapag Elementary School and Tanapag Headstart. An amendment to the protest was filed by Casa on May 2, 1996 to include Marianas High School and Garapan Headstart among the schools covered in its protest.

On May 8, 1996, the Commissioner requested Casa to clarify its protest and advised it to provide the factual basis and legal grounds of its protest. This was disputed by Casa on June 7, 1996, arguing that it could only provide PSS its requested information after PSS had furnished it a copy of the proposal submitted by one of the proposers. After receiving the requested information from PSS, Casa filed a formal protest of bid rejection to the Commissioner on June 27, 1996. On July 5, 1996, Casa informed PSS that its earlier protest was not limited only to Tanapag Elementary and Tanapag Headstart but should also include every school which was not awarded to it. The other schools included in Casa's proposal for which it was not awarded were: Garapan Headstart and Marianas High School.

On July 18, 1996, the Commissioner released his decision on Casa's protest which denied three of the four arguments in the protest. One argument was sustained in that the Commissioner ordered an immediate second evaluation of the proposals. The second evaluation that covered the schools protested by Casa was finalized on July 30, 1996. The Commissioner informed Casa by letter dated August 14, 1996 about the result of the second evaluation which showed that Casa was not going to be awarded the contracts for the four schools it had protested. By letter dated August 28, 1996, Casa filed an appeal with the Public Auditor on the denial of its protest by the Commissioner. On September 4, 1996, OPA informed the Commissioner of Casa's appeal, and requested him to submit a complete report on the appeal and to instruct interested parties to communicate directly with OPA. The Commissioner submitted his report to OPA on September 24, 1996, with copies given to Casa and other interested parties. By letter dated October 2, 1996, Casa issued its rebuttal to the Commissioner's report on the appeal.

ANALYSIS

The denial of Casa’s protest by the Commissioner is the issue of this appeal. The following discusses the arguments by PSS and Casa as they were presented in the protest process, including OPA’s comments on the merits of the arguments.

Evaluation of the Proposals

Five vendors submitted proposals for Saipan schools that included ten headstart centers, ten public elementary, jr. high, and high schools, and two private schools, as follows:

| Schools | Casa | Auntie Mag’s | M.V. Reyes | Chamolinian Deli | JCG Services |
|--|------|--------------|------------|------------------|--------------|
| <i>Headstarts</i> | | | | | |
| Tanapag | X | | X | | |
| Garapan | X | X | | | |
| San Vicente | | X | | | |
| San Vicente Dandan | | X | | | |
| Oleai | | X | | | |
| Susupe | | X | X | | |
| Chalan Kanoa | | | X | | |
| Chalan Kanoa Peer | | X | | | |
| San Antonio | | | X | | |
| San Antonio Peer | | X | X | | |
| <i>Public Elem., Jr. High, and High Schools</i> | | | | | |
| Gregorio T. Camacho Elementary School | X | | | X | X |
| Tanapag Elementary School | X | | X | X | |
| Garapan Elementary School | X | | | | |
| Oleai Elementary School | | X | | | |
| San Vicente Elementary School | | X | | | |
| San Antonio Elementary School | | | X | | |
| Koblerville Elementary School | | X | | | |
| William S. Reyes Elementary School | | | X | | |
| Hopwood Jr. High School | | X | | | |
| Marianas High School | X | X | X | | |
| <i>Private Schools</i> | | | | | |
| Mt. Carmel | | | X | | |
| Sr. Remedios | | | X | | |
| Number of Schools Proposed | 6 | 12 | 11 | 2 | 1 |

The Committee reviewed the documents submitted with the proposals and listed the following items as additional information needed from the respective proposers:

Casa: (1) a listing of staff showing their work experience, position title, and hourly wage, (2) a verified complete listing of inventory of all equipment and cooking utensils to be used in the preparation of the food, and (3) a letter of credit from the respective suppliers of the commodities being purchased.

Auntie Mag's: (1) a listing of employees showing their position titles, experience and hourly wage, (2) a verified current list of inventories, (3) an identification of where Auntie Mag's will get its fresh produce, (4) a plan for increasing student participation, if any, and (5) a listing of suppliers and line of credit with the respective supplier.

M.V. Reyes: (1) the hourly wages of the staff, (2) a description or a picture of the kitchen facility, (3) an identification of where the vendor will get its local produce, (4) a four-week cycle menu, (5) a plan to increase student participation, if any.

Chamolinian Deli: (1) how the vendor planned to fill vacancies, (2) the names of servers and drivers, (3) a verified current listing of inventory, (4) a plan for increasing student participation, if any, (5) a cash flow projection for the next two years, and (6) a listing of the vendor's suppliers and its line of credit.

The Committee made its evaluation on April 16, 1996 based on the following criteria:

- | | |
|--------------------------|---------------------------|
| 1. Management experience | 25 possible points |
| 2. Staffing | 25 possible points |
| 3. Ability to perform | 25 possible points |
| 4. Additional services | <u>25 possible points</u> |

T o t a l 100 possible points

Using these factors, the Committee selected the following successful proposers in the order of ranking: (1) M.V. Reyes, (2) Auntie Mag's, and (3) Casa. In a memorandum dated April 17, 1996, the Commissioner concurred with the result of this evaluation. In this memorandum, PSS stated that it was going to award M.V. Reyes (the top-ranked proposer) all the eleven schools it had proposed for. By letter dated April 24, 1996, Auntie Mag's, as the second-ranked proposer, was notified that it would be awarded the nine schools included in its proposal which were not proposed by M.V. Reyes. Casa was also notified, by letter dated April 24, 1996, that it would be awarded the rest of the schools which were not proposed for by either M.V. Reyes or Auntie Mag's but were included in its proposal. The schools awarded to Casa were Garapan Elementary School and Gregorio T. Camacho Elementary School.

Casa's Arguments in its Protest to the Commissioner

In its protest to the Commissioner, Casa specifically requested that it be awarded the contract under the subject RFP for Tanapag Elementary School and Tanapag Headstart,

which was later amended to include all schools for which it was denied the award. Casa provided the following four grounds (listed as A to D) in its protest to the Commissioner:

Ground A. Casa claimed that the Committee violated section 3-106(6) of the PSSPR by entering into discussions with proposers. Casa explained that discussions may only take place if expressly stated in the proposal, and RFP 96-004 failed to state that discussions might be conducted with the proposers. The Committee purportedly requested additional information and conducted discussions with the proposers, which resulted in major revisions to the proposals. Casa concluded that these discussions were unauthorized and should not have taken place as they violated PSSPR Section 3-106.

Ground B. Casa claimed that the Committee violated PSSPR Section 3-106 (7) by deviating from the evaluation factors set forth in the RFP. Casa stated that the proposers were not informed that the Committee would be using a different award criteria from what was set forth in the RFP. Casa concluded that the Committee's action in using a different criteria was tantamount to a denial of due process and unfair competition.

Ground C. Casa claimed that the Committee violated PSSPR 3-106(5) by failing to reject proposals that did not meet the essential requirements of the RFP. Casa explained that the RFP stressed that proposals must address the essential requirements of the School Breakfast and Lunch Program and that incomplete proposals would be rejected. PSS purportedly violated this RFP requirement.

Ground D. Casa claimed that the contract awards for Tanapag Elementary School and Tanapag Headstart were not valid. No additional details were provided except for stating that contracts for Tanapag Elementary School and Tanapag Headstart were awarded in violation of the Procurement Rules and Regulations. Also, the title stated in the appeal for this argument showed that Casa questioned the contract for Garapan Headstart instead of Tanapag Headstart. We believe that the appellant meant to question Tanapag Headstart as this was the one consistently discussed in the argument.

Decision on the Protest by the Commissioner

The Commissioner informed Casa that PSS had denied all the grounds in its protest except for Ground B which would be acted upon by PSS. Regarding Casa's argument that the Committee did not evaluate the proposals appropriately, the PSS decision stated that appropriate action would be taken by PSS to ensure that a suitable evaluation was immediately conducted. Following is a summary of the Commissioner's comments on each ground of the protest:

Ground A: The Commissioner stressed that it is appropriate for the Procurement Office to conduct discussions with applicants in order to determine whether they are responsible pursuant to PSSPR Section 3-301, and that it is also appropriate to conduct discussions with responsible proposers who were determined to be reasonably susceptible to being selected for award. The decision added that it was also appropriate to visit the applicants' places of business for inspections.

The Commissioner explained that although the RFP did not specifically mention that there would be negotiations, Sections 3-106(4) and 3-501 of the PSSPR clearly provide that the Committee may seek information by all appropriate means in order to verify with the bidders the exact contents of their proposals. According to the Commissioner, it is PSS' official finding that the Committee had accorded all proposers fair and equal treatment in these discussions.

Ground B: The Commissioner concluded that the Committee did not evaluate the proposals appropriately. The decision stated that the Committee mistakenly used last year's criteria in evaluating this year's RFP. Accordingly, the decision provided that appropriate PSS action to ensure that suitable evaluation is conducted would be taken immediately.

The second evaluation which was finalized on July 30, 1996 was based on the six criteria set forth in the RFP. The result of the second evaluation was made known to Casa by letter dated August 14, 1996 that was signed by the Commissioner. The second evaluation was conducted by the same Committee that conducted the first evaluation ("Committee" as mentioned in succeeding discussions refers to the group that conducted the first and second evaluations). In rating the proposals, the Committee assigned the maximum points to each of the six evaluation criteria such that each proposal could receive a maximum of 100 points from each evaluator. The evaluators gave the following points to each proposer in the order of ranking: (1) Auntie Mag's- 376 points, (2) M.V. Reyes- 366 points, (3) Casa- 329 points, (4) Chamolinian Deli- 312 points, and (5) JCG Services- 304.50 points. Based on this ranking, the Committee recommended awards of the schools under protest as follows: (1) Tanapag Headstart and Tanapag Elementary School to M.V. Reyes, and (2) Garapan Headstart and Marianas High School to Auntie Mag's.

Ground C: The Commissioner denied the protester's claim that the Committee violated PSSPR Section 3-106(5) by not rejecting proposals that failed to meet the essential requirements of the RFP. The decision stated that PSS, in its instruction to bidders, had specifically reserved the right to reject any or all proposals or waive any defects in the proposals if in its sole opinion its best interest required.

Ground D: The decision stated that as of July 18, 1996, PSS had not yet awarded the contracts for Tanapag Elementary School and Garapan Headstart as it had merely indicated its intent to award these contracts.

Casa's Arguments in its Appeal to the Public Auditor

Casa specifically requests in its appeal to the Public Auditor that (1) the school breakfast and lunch program under RFP 96-004 for Tanapag Elementary School, Tanapag Headstart, and Garapan Headstart be awarded to Casa, or in the alternative (2) a new evaluation team be formed to reevaluate the proposals. Casa provided five grounds for its appeal (listed from A to E). Grounds A, C and D were the same grounds mentioned in Casa's protest to the Commissioner. Ground B was focused on the second evaluation in that Casa claimed that one of the evaluation criteria called "additional services" was not considered in the second evaluation. In ground E, Casa claims that some of the Committee members abused their discretion in evaluating RFP 96-004; specifically, Casa stated that the evaluation results

were not supported by the proposals. To support ground E, Casa cites instances where it purportedly should get higher points on each of the evaluation criteria, as follows:

- (1) Evaluation of the bid price. Casa claims that the RFP established a fixed rate for breakfast and lunch which was also the same rate proposed by all the vendors. Out of 15 maximum points for this criterion, Casa received 12 points from one of the evaluators while M.V. Reyes received 14 points. Casa believes that there is no basis for the difference in points.
- (2) Evaluation of the proposers' food service management qualification. Casa claims that it has provided the required information for this criterion. According to the appellant, both Casa and M.V. Reyes have the necessary employees to operate the breakfast and lunch program. Moreover, Casa emphasized that its owner manages the business policies and supervises all employees of the company, and has done all the long term business planning for the past ten years. Casa believes that it has excelled in this area and therefore should get more points than M.V. Reyes.
- (3) Evaluation of the adequacy of facilities and equipment. Casa claims that it has more essential equipment than M.V. Reyes and that both listed adequate cooking pots and utensils necessary in meeting the requirements of the RFP. According to the appellant, the evaluation of the proposer's capability in this area tips in favor of Casa, given the fact that Casa has more equipment than M.V. Reyes and that Casa would be serving fewer schools than M.V. Reyes. Casa believes that its score of 47 points compared to M.V. Reyes' score of 54 points was not justified by the facts presented in the proposals.
- (4) Evaluation of the proposers' capability to produce and deliver meals. Casa claims that the RFP divided this criterion into three parts and that it complied with all the parts. Furthermore, Casa claims that it had an edge over M.V. Reyes on the third part which requires submission of a plan to increase student participation in the program. According to Casa, it has an entertainment program that encourages student participation and a track record for Garapan Elementary School that shows student participation increased by 138% in the previous school year. Casa believes that the scale tips in its favor after weighing all the information. Specifically, Casa mentioned that one of the evaluators gave Casa an unbelievably low score of 10 points (out of 25 maximum points) while the same evaluator gave M.V. Reyes 25 points. Casa believes that this score was not supported by facts, that there was bias against Casa, and that such rating was arbitrary and capricious.
- (5) Evaluation of the proposers' capability to maintain cafeteria premises in compliance with health standards. The appellant claims that both Casa and M.V. Reyes proposed to maintain the cafeteria in compliance with health standards and that there should be no difference between their points in this area. Casa believes that the points given to the two proposers were not supported by facts.
- (6) Evaluation of the proposers' financial capabilities. Casa claims that it presented a sound financial statement necessary to carry out the requirements of the RFP. It stated that its line of credit from City Trust Bank is a continuing guarantee and that it has

sufficient cash flow to purchase the needed supplies for the breakfast and lunch programs. Casa received 57 points while M.V. Reyes received 56 points in this area. Casa believes that its proposal supports a higher score than the one it received from the evaluators.

The Commissioner's Comments in his Report to the Public Auditor

The Commissioner responded to OPA's request for a written report on Casa's appeal. The Commissioner's report provided the following comments on the appeal:

- (1) The Commissioner claims that OPA lacks jurisdiction to hear this appeal because Casa filed its appeal too late. According to the Commissioner, the PSSPR provides that an appeal must be filed not later than *10 days* from the date the Commissioner should have decided the protest. In concluding that the appeal was filed late, the Commissioner argued that Casa's appeal on August 28, 1996 was forty days from July 18, 1996, the date on which PSS contends a decision on the protest was made by the Commissioner. According to PSS' report on the appeal, Casa may argue that the *10 days* period should begin on August 14, 1996, the day that Casa received the result of the second evaluation done by the Committee, in which case PSS asserts that Casa is appealing the Committee's decision and not the Commissioner's. According to PSS, this is not in compliance with PSSPR Section 5-102(1) which requires that "a written appeal to the Public Auditor from a decision by the Commissioner may be taken provided the party taking the appeal has first submitted a written protest to the Commissioner..."

The PSS report on the appeal also stated that Casa may argue that it is allowed by the PSSPR to file its appeal within ten days of the date the Commissioner should have decided the protest, rather than the date that he actually decided on the protest. The Commissioner stressed that Casa's appeal is still too late even if the ten-day period were to be counted from August 8, 1996, the date when the Commissioner should have decided the protest in accordance with the PSSPR. Section 5-101(1)(c) of the PSSPR requires the Commissioner to render a decision within 30 calendar days after all interested parties have submitted their views. Moreover, the Commissioner explained that this appeal does not present "issues significant to procurement practices that are not detrimental to PSS should the appeal be considered", and therefore should be dismissed.

- (2) The Commissioner claims that even if OPA does not find PSS' arguments above to be persuasive, the appeal must still be denied because grounds A, C, & D were not supported by facts and grounds B and E were not properly before OPA for review. On grounds A and C, the Commissioner restated his arguments in the July 18, 1996 decision. For grounds B, D, and E, the Commissioner provided the following additional comments:
 - Ground D is purely conclusory in nature and is difficult to understand, much less respond to intelligently. More information must be submitted by Casa to be able to put PSS on notice as to what they are protesting. To make a blanket statement that the contracts for Tanapag Headstart and Tanapag Elementary School are

improper because they do not comply with the regulations does not sufficiently place PSS on notice as to what was done incorrectly.

- Grounds B & E are not properly before OPA for review as these were not included in Casa's June 27, 1996 appeal to PSS. Because OPA is precluded from jurisdiction over consideration of appeals which have not been raised previously to PSS, OPA must dismiss grounds B and E.

OPA's Comments

We first discuss the issue of whether Casa's appeal with OPA on August 28, 1996 was filed timely or late. Based on the merits of the arguments presented to us, we disagree with PSS' position that Casa filed its appeal too late and thereby OPA lacked jurisdiction to hear the appeal. We have determined that Casa filed a *timely* appeal with OPA because the ten-day period within which the appeal should be filed began on August 14, 1996. Section 5-102(3) of the PSSPR provides that an appeal from the Commissioner's decision must be received by the Office of the Public Auditor not later than ten (10) days from the date that he should have decided the protest. In protest procedures, all "days" referred to in the PSSPR are deemed to be working days of PSS and in determining the tenth working day, the day the appealable decision was rendered should be excluded. The tenth working day from August 14, 1996 is August 28, 1996; thus, the appeal was timely and OPA has jurisdiction over it.

We view August 14, 1996 as the date when the Commissioner should have decided the protest because it was on this date that a *final decision* was issued on Casa's protest. In its protest letters dated April 30, May 2, June 27, and July 5, 1996, Casa specifically requested that the Commissioner terminate the current contracts for Tanapag Elementary School and Tanapag Headstart, as well as Garapan Headstart and Marianas High School, and instead award Casa the contracts for these schools. There was no final action on the protester's request until the second evaluation was completed and the result made known by the Commissioner's letter to Casa dated August 14, 1996. The Commissioner's letter provided effective notice that Casa was not going to be awarded the contracts for the four schools it had protested. Specifically, the Commissioner stated that the contracts for Tanapag Elementary School and Tanapag Headstart were to be awarded to M.V. Reyes while the contracts for the other two schools would be given to Auntie Mag's.

We agree with Casa that the earlier decision dated July 18, 1996 was not one that could be appealed, since a definitive ruling was not issued until the result of the second evaluation was made known to Casa through PSS' letter dated August 14, 1996. Furthermore, we consider both the July 18 and August 14, 1996 decisions not as two separate decisions but one decision that was made in two parts -- the latter decision being made to complete the earlier one. Specifically, with regard to the first evaluation, the July 18, 1996 decision ruled that "...the Committee did not evaluate the proposals appropriately...Appropriate PSS action to ensure that suitable evaluation is conducted shall be taken immediately." The notification on the result of the second evaluation was indeed the appropriate action needed for PSS' final response on the protester's request.

In a related argument, PSS states that Casa was appealing the result of the Committee's reevaluation by claiming that the ten-day period should begin tolling on August 14, 1996. PSS argued that the appellant failed to comply with the requirement of the PSSPR that the appeal should be from the Commissioner's decision and not from the result of the Committee's reevaluation. Our review showed, however, that the August 14, 1996 letter was signed by the Commissioner himself, indicating that the action contained in the letter was sanctioned by the Commissioner. Although it was shown in the letter that PSS communicated the result of the second evaluation, we believe that the substance of the Commissioner himself sending the letter was his concurrence with the action taken by the Committee. One cannot reasonably expect the Commissioner to send another letter containing his own decision after sending the August 14, 1996 letter, much less expect a subsequent letter that would disagree with the position already taken.

Of the five grounds in the appeal (listed A to E in Casa's appeal), PSS contends that grounds B and E are not within the jurisdiction of OPA as these were not protested first to PSS. Section 5-102(1) of the PSSPR provides that a written appeal to OPA from a decision by the Commissioner may be taken provided the party taking the appeal has first submitted a written protest to the Commissioner. However, the PSSPR does not specifically require that each ground has to be protested to the Commissioner for the same relief being requested by the appellant. In its appeal to OPA, Casa requested that it be awarded the contract for the school breakfast and lunch program under RFP 96-004 for Tanapag Elementary, Tanapag Headstart, and Garapan Headstart -- the same relief requested in its earlier protest with the Commissioner, except that Marianas High School which was included in the earlier protest was not mentioned in the relief requested from OPA. The fact is that Casa is appealing the Commissioner's decision denying it the award for the three schools under RFP 96-004 -- a decision which had been protested to but denied by PSS. Furthermore, in a multi-part decision such as PSS' decision on this protest, it is not practicable that the protester is required to file an appeal every time each part of a decision is issued because then the appeal becomes an unnecessarily complicated and time-consuming process.

In a previous request for reconsideration of an appeal decision [AJ Commercial Services, Division of Corrections (DOC) Food Service Program, March 31, 1995], OPA concluded that "the CNMI Procurement Regulations do not restrict the Public Auditor from taking all relevant matters into consideration when reviewing an appeal...The Public Auditor is also allowed to obtain all necessary information from all interested parties. By being able to review all facts and not just the documents related to the appellant, the Public Auditor can render a decision that serves the best interest of the CNMI Government and all interested parties." The request for reconsideration was related to a previous decision involving the responsiveness of bidders on a food service program for DOC inmates. The requester, a bidder who was not an appellant, objected to OPA's review of the responsiveness of its bid, arguing that the procurement procedures set out a formalized process that a bid must go through before OPA could review it. In deciding the reconsideration request, OPA affirmed its previous decision.

Accordingly, we conclude that OPA *has jurisdiction* to consider all five grounds on the appeal. Following is our discussion of the merits of each of the five grounds in the order they were presented in the appeal:

Ground A: The appellant claims that the Committee violated Section 3-106(6) of the PSSPR by entering into discussions with proposers. We *do not agree* with the appellant. We believe that conducting discussions with proposers is appropriate, and not a violation of the PSSPR, in determining whether an offeror is a responsible contractor. In fact, the PSSPR requires PSS to obtain information from the offerors for determination of whether they are responsible contractors.

We believe that generally the PSSPR does not intend to restrict discussion with proposers even if the solicitation request does not expressly authorize discussion. PSSPR Section 3-106(6) does not state that discussions with proposers can be conducted only if it is provided in the request for proposals. Besides, the common practice under a request for proposals is that the contracting agency determines those proposers within the competitive range and conducts discussions with those proposers to obtain their best and final offer. Such discussion is normally engaged in under a request for proposals to ensure that the government gets the *best value*, unlike competitive bidding where no discussion is normally permitted after opening of the bids.

Ground B: The appellant claims that the Committee violated Section 3-106(7) of the PSSPR by deviating from the evaluation factors set forth in the RFP. Specifically, Casa claims that PSS did not include “additional services” as one of the criteria in its second evaluation. We *do not agree* with the appellant. Our review of the proposal package showed that additional services were not among the six criteria for evaluation in the RFP. The instruction to proposers stated that the award would be based on the following criteria: (1) bid price, (2) food service management qualifications, (3) adequacy of facilities, equipment and staff, (4) capability to produce, deliver and serve meals on site, (5) capability to maintain cafeteria premises in compliance with health standards, and (6) financial capabilities.

In the checklist of documents to be submitted by the proposers, PSS asked about additional services that the proposers wished to provide in addition to the services specifically requested in the RFP. As mentioned in the checklist, additional services included ala carte food items, nutritional food items to be sold at recess or after school for approved school fundraisers, among other services. It is true that information on additional services was asked for in the RFP; however, it is clear that this was not among the criteria for awarding the contract. Accordingly, PSS used the proper criteria in conducting the second evaluation of the proposals.

Ground C: The appellant claims that the Committee violated PSSPR Section 3-106(5) by not rejecting proposals that failed to meet the essential requirements of the RFP. PSSPR Section 3-106(5) provides that the request for proposals shall state the relative importance of price and other evaluation factors. This requirement is not directly related to the argument. PSSPR 3-106(5) deals with information that is required to be in the RFP, while the appellant’s argument pertains to alleged failure to comply with the stated requirements in the RFP. Nevertheless, it was evident from the discussion in the appeal that the appellant mainly raised the issue that PSS should have rejected the proposal submitted by M.V. Reyes, the appellant’s competitor for Tanapag Elementary School and Tanapag Headstart, as the latter purportedly failed to submit essential information required by the RFP. We *do not agree* with the appellant.

PSS has the right to reject proposals not meeting the essential requirements of the RFP. Our review of the solicitation of proposals that was published in a local newspaper and the instruction to proposers showed that PSS had specifically reserved the right to waive any defects in the proposals if in its sole opinion it would be in the best interest of PSS. In its comments on the appeal, PSS stated that it was more appropriate and in the best interest of PSS to obtain more information from the proposers instead of rejecting the proposals outright. We agree that in this situation it is more appropriate for PSS not to reject the proposals because in so doing PSS avoided the significant cost and time required to conduct the solicitation process all over again when the procurement could be satisfactorily completed by obtaining relevant information from the proposers. Besides, we believe that PSS' action was fair to all the proposers for the three schools covered in the appeal since each of them was given the chance to submit the required documents to rectify the deficiencies in their proposals.

Casa further argues that the deficiencies identified by PSS on M.V. Reyes' proposal were essential requirements in the RFP. Our review showed, however, that there were deficiencies by Casa that were just as important as the other proposers' deficiencies. For instance, PSS found that Casa needed to submit the listing of staff showing their work experience, duty, and hourly wages. Such deficiency would be critical for determining food service management qualifications, which was one of the criteria for award. Even if PSS had opted to reject proposals not meeting the essential requirements in the RFP, we believe that the appellant would have to be rejected too.

Ground D: The appellant claims that the contract awards for Tanapag Elementary School and Tanapag Headstart were not valid. No other details were provided by Casa except for stating that the contract awards for Tanapag Elementary School and Tanapag Headstart were given in violation of the Procurement Regulations. In its report on the appeal, PSS commented that the argument is difficult to understand and more information should have been submitted by Casa to put PSS' on notice as to what it is protesting. We agree with PSS' comment on this argument. We *dismiss* this argument on the ground that OPA cannot rule on a claim that is not clearly and sufficiently stated. The appellant's comment dated October 2, 1996, which was a rebuttal to PSS' comments on the appeal, did not provide any further details on this argument.

As an additional comment, if Casa was referring to its argument in ground C for stating that the contract awards for the two schools were not valid, we could not agree with such argument as we have already disagreed with ground C. As stated in our earlier discussion of ground C above, we do not agree with Casa's argument that the Committee's failure to reject M.V. Reyes' proposal was in violation of PSSPR Section 3-106(5).

Ground E: The appellant claims that some of the Committee members abused their discretion in evaluating RFP 96-004, and that the evaluation results were not supported by the proposals. On the argument that the Committee members abused their discretion, there was no direct evidence to show that the evaluators abused their discretion on the second evaluation of the proposals. However, we *agree* with the appellant's argument that there were instances where the result of the second evaluation were not supported by the proposals. The proposals were rated through a numerical point system, and the second

evaluation showed the top three proposers in the order of ranking: (1) Auntie Mag's, (2) M.V. Reyes, and (3) Casa. We agree with the appellant's argument because our review of the rating sheet on the second evaluation showed that the number of points given to the top three proposers were not consistent with the proposals and other documents in RFP 96-004. For instance:

- (1) The Committee included bid price as one of the evaluation factors although the cost of each meal had already been established in the RFP. The instruction to proposers set the price of each meal for school year 1996-1997 at a daily rate of \$3.18, consisting of \$1.09 for breakfast and \$2.09 for lunch. Our interview with the PSS Procurement Officer showed that the price for this contract has been fixed by the level of funding provided by the U.S. Government. Additionally, even if the vendors' proposed prices would be considered, there should still be no difference in points because all the five proposers for Saipan schools had proposed \$1.09 for breakfast and \$2.09 for lunch which were the same prices set by PSS for this RFP. Out of the 15 maximum points assigned for bid price, one evaluator gave 12 points to Casa and 14 points each to the other four proposers. Although the other three evaluators were fair enough to give 15 points to each of the five proposers, it was clear that Casa received fewer points when there was no reason for the points to vary for each proposer. In fairness to all the proposers, bid price should have been eliminated from the evaluation criteria.
- (2) Adequacy of facilities and equipment has 15 maximum points, and the evaluation showed the following points given to the top three proposers:

| Evaluator | M.V. Reyes | Auntie Mag's | Casa |
|---------------------|-------------------|---------------------|-------------|
| No. 1 | 12 | 14 | 12 |
| 2 | 13 | 15 | 10 |
| 3 | 14 | 15 | 10 |
| 4 | 15 | 15 | 15 |
| Total Points | 54 | 59 | 47 |

As shown above, Evaluator Nos. 2 and 3 each gave Casa 10 points while M.V. Reyes received 13 and 14 points from the same evaluators. On the other hand, Auntie Mag's received a total of 12 points more than Casa from Evaluator Nos. 1, 2, and 3. However, with regard to delivery equipment, stoves and ovens, and cold storage equipment, our review showed that Casa has comparable equipment, and in some instances even more equipment, than M.V. Reyes and Auntie Mag's; yet those two vendors received more points than Casa. A comparison of the three vendors' delivery equipment, stoves and ovens, and cold storage equipment is shown in the following table.

| Equipment | M.V. Reyes | Auntie Mag's | Casa |
|--------------------|-------------------|---------------------|-------------|
| Delivery equipment | 3 vehicles | 3 vans | 3 vans |

| | | | |
|-------------------------|---|-----------------------|----|
| Large gas stove | 5 | total of 10 stoves | 10 |
| Regular gas stove | 2 | | 1 |
| Large conventional oven | | | 2 |
| Conventional oven | | | |
| Gas stove oven | 1 | | |
| Chill box | 1 | 3 | 3 |
| Cooler | | | 1 |
| Deep freezer | 4 | 3 | 3 |

Additionally, aside from the items listed above, Casa, M.V. Reyes and Auntie Mag’s listed other kitchen ware and appliances. However, we were not able to establish which proposer has the edge in this area because available documents do not show how the evaluators compared the proposers’ kitchen ware and appliances. Also, our review showed that an itemized comparison of the proposers’ kitchen ware and appliances might be difficult to do because there was no uniformity in the information contained in the listing provided by the proposers. The individual kitchen ware and appliances in the list varied from each proposer.

- (3) On the capability to produce and deliver meals which has 25 maximum points, the evaluators gave the following points to the top three proposers:

| Evaluator | M.V. Reyes | Auntie Mag’s | Casa |
|--------------|------------|--------------|------|
| No. 1 | 23 | 23 | 21 |
| 2 | 24 | 24 | 20 |
| 3 | 23 | 24 | 10 |
| 4 | 15 | 20 | 20 |
| Total Points | 85 | 91 | 71 |

As shown above, M.V. Reyes and Auntie Mag’s received significantly more points than Casa, a difference of 14 and 20 points, respectively. Our review suggests, however, that the proposers’ rating on the capability to produce and deliver meals could not have been based on documents submitted under this RFP. Our review of the requirements in the rating sheet does not specifically justify the higher points given to M.V. Reyes and Auntie Mag’s, as follows:

- Requirement (a) asked that the proposer attach a plan for the purchase of food products, and PSS stated its preference to support and encourage local agriculture. The three proposers submitted information about their local source for fresh produce. Based on documents provided to us, we believe that no proposer had a significant edge in this area.
- Requirement (b) asked that the proposers attach a four-week menu which should be approved for nutritional value by the CHC Nutritionist if different from the PSS menu. Our review showed that the three proposers submitted their sample menus and we believe that no proposer had a significant edge.

- Requirement (c) asked that the proposer attach a plan to increase student participation in the program and promote nutritional education. Our review showed that M.V. Reyes and Casa indicated their general plan to increase student participation in the program. Available documents showed that there was no similar plan for Auntie Mag's.

Furthermore, the evaluation showed that Casa received the lowest points from the four evaluators on the capability to produce and deliver meals. Even the two unsuccessful proposers, JCG Services and Chamolinian Deli, were given a total of 78 and 72 points, respectively, in this category compared to Casa's 71 points. This shows that the evaluators believe that Casa could not even equal or exceed the capability of the two unsuccessful proposers to produce and deliver meals required for the program. Yet Casa was awarded a contract under this RFP to produce and deliver meals for two elementary schools, and has been serving these schools for the current school year. By letter dated June 20, 1995, Casa was even given a favorable citation by the Commissioner for its performance in a previous PSS food service contract. In that letter, the Commissioner stated that Casa's service had provided many direct nutritional benefits to PSS students, and that PSS had experienced a 138 percent increase in meal participation since Casa was awarded the contract to provide meals at Garapan Elementary School.

Our interview with two members of the Committee showed that the proposers' capability to produce and deliver meals was evaluated mainly by comparing the proposers' kitchen facilities and equipment obtained from the site inspections as well as related information from documents submitted by the proposers. We were not able to review the results of the site inspections for the second evaluation because we learned that the result of the inspections were not documented. We were told by the same evaluators that there was no substantial evaluation of the menu submitted by proposers insofar as determining whether their resources are adequate to enable them to satisfactorily deliver the menu they have proposed. Such resources would include the kitchen facilities and equipment, human resources, and financial resources. In evaluating capability to produce and deliver meals, the evaluators should have not focused only on comparing the proposers' kitchen facilities and equipment and other factors but should have also determined whether each proposer has the necessary resources to deliver the meals they have proposed. One of the evaluators explained that a verification of the proposed menu was appropriately excluded in the evaluation because he believes that the vendors would have not proposed if they lack the necessary resources to produce and deliver such menu for the program. However, this was an improper assumption and certainly not a reason for failing to verify the menu against the resources of the proposers.

Additionally, we believe that the capability to produce and deliver meals is related to the other four evaluation criteria. For instance, a proposer cannot be reasonably expected to have a better capability to produce and deliver meals over another proposer if it is found that the latter has: (1) better food service management qualifications, (2) more facilities and equipment, (3) better capability to maintain cafeteria premises in compliance with health standards, and (4) better financial standing. We expected,

therefore, that the evaluators' ratings on the capability to produce and deliver meals factor would not deviate greatly from the ratings on the other four evaluation factors. Our review showed, however, that Casa received the lowest total point among *all five* proposers on the capability to produce and deliver meals factor although it was rated higher overall than the two unsuccessful proposers on the other four evaluation criteria. This unexpected, and we think unwarranted, deviation in the evaluation of the capability to produce and deliver meals factor means the second evaluation was not properly conducted.

- (4) Regarding financial capability, out of 15 maximum points, two evaluators each gave 14 points to Casa while M.V. Reyes received 15 points from each of the same evaluators. Our review of the financial statements and available documents from the two proposers showed, however, that in some aspects Casa had a better financial standing than M.V. Reyes. For instance, during calendar year 1995, M.V. Reyes had total current assets of \$44,104 and total current liabilities of \$76,750, or a working capital ratio (current assets over current liabilities) of 0.57 to 1. For the same period, Casa's financial statements showed total current assets of \$41,331 and total current liabilities of \$50,622, or a working capital ratio of 0.82 to 1. Working capital ratio is a test of short-term liquidity or the ability to meet current obligations from current assets. Although both vendors have more current liabilities than current assets, Casa has a higher working capital ratio which indicates a better capability of the vendor to meet current financial obligations. Information available to us showed even a better picture for Casa in calendar year 1994 in which its working capital ratio was 1.17 to 1.

Regarding credit information, documents provided to us showed that Casa had an approved credit line of \$50,000 from a local bank for the purchase of needed inventories, payment of payroll, and other related expenses for the PSS lunch program. Also, Casa stated that it had an approved credit line with three local wholesalers totaling \$32,000. M.V. Reyes' proposal included only (1) a letter from J.C. Tenorio Enterprises, Inc. stating the latter's commitment to provide assistance in the form of management expertise, consulting services, and a guaranteed constant supply of food and other inventory items at the lowest possible price, and (2) a listing showing the four local vendors from whom produce is purchased.

We believe that another factor that caused the improper evaluation of the proposals is that some members selected to sit on the Committee were not qualified to evaluate the technical aspects of the proposals. We learned that the members of the Committee were selected based on previous years' practice of having the Food Service Manager, Federal Programs Coordinator, Chief Procurement Officer, and a staff member from the Finance and Budget Office sit on the evaluation committee. We were told that the staff member from the Finance and Budget Office was selected by the head of that office. Each of the four Committee members conducted its independent rating of the proposals in all of the evaluation factors, including areas which we believe are the technical aspects for this RFP such as adequacy of facilities and equipment, capability to produce and deliver meals, food service management qualification, and capability to maintain cafeteria premises in compliance with health standards. To be an effective evaluator in these technical areas, we believe that one should have knowledge about the preparation of meals as well as general

understanding of the operation of the school breakfast and lunch program. However, information available to us showed that, of the four Committee members, (1) only the Food Service Manager has work experience that directly involves cooking and preparing meals, (2) two evaluators have college degrees but such were not related to food service management or any related discipline, and (3) only the Food Service Manager had direct involvement in the food service operations of the school breakfast and lunch program.

Also, there were indications of unwarranted subjectivity in the second evaluation as shown by the absence of consensus among the evaluators in some areas. For example, in the evaluation of the proposers' capability to produce and deliver meals, one evaluator gave Casa five points higher than M.V. Reyes while the other three evaluators gave higher points to M.V. Reyes over Casa by two, four, and thirteen points, respectively. In this case, the evaluators not only differed about which proposer had the edge but also differed significantly as to the points awarded to the two proposers. On financial capability, the four evaluators differed on which proposer had the edge when we compared Casa's points with M.V. Reyes', Casa's with Auntie Mag's, and M.V. Reyes' with Auntie Mag's.

OPA cannot provide a complete list of instances where the proposals may have been improperly evaluated mainly because the reasons for the points given to the proposers were not documented by the evaluators. The rating sheets used on the second evaluation provided the points given to the proposers opposite each evaluation criteria; however, there were no remarks from the evaluators as to their basis for the points given to each proposer. Although the PSSPR does not specifically require such documentation, writing down the basis for the points given to each proposal would certainly help ensure objectivity in the evaluation as well as facilitate subsequent review of the evaluation.

DECISION

The Office of the Public Auditor **grants** the appeal **in part**. On the appellant's request that we terminate the contracts for Tanapag Elementary School, Tanapag Headstart, and Garapan Headstart, and instead award them to Casa, we **deny** the request. However, we **grant** the appellant's request that a new evaluation team be formed to reevaluate the proposals. Accordingly, PSS is directed to form two qualified independent teams, as soon as possible, to conduct a reevaluation of the proposals received by PSS for Tanapag Elementary School, Tanapag Headstart, and Garapan Headstart. The reevaluation of the proposals is to be completed not later than thirty (30) calendar days from the date of this decision.

One team should be formed to evaluate the technical capability of the proposers, namely: food management qualifications, adequacy of facilities and equipment, capability to produce and deliver meals, and capability to maintain cafeteria premises in compliance with health standards. The members of this team should be selected based on their background and experience in preparation of meals. Another team should be formed to evaluate the financial capability of the proposers, and the members should be persons with background and experience in financial analysis.

The bid price should not be considered in the evaluation as price competition does not apply in this case. Before conducting the actual evaluation, the respective evaluation teams should establish the completeness of documents needed for the evaluation. The team members should use the same numerical point system used in earlier evaluations and explain in the rating sheets the basis for giving the points to each proposer. To help ensure that the decision is impartial, we further recommend that the members of these teams be different from the previous evaluators.

Based on the result of the reevaluation, PSS is further directed to either ratify or terminate the existing food service contracts for Tanapag Elementary School, Tanapag Headstart, and Garapan Headstart consistent with the requirements of the PSSPR. The contract for these schools should be awarded to the proposer garnering the most points in the reevaluation. If there is a transition from a current contractor to the successful proposer as a result of the reevaluation, PSS should allow a certain number of days before the new contract takes effect to ensure that there is no disruption of the food service operation of the school. In fairness to all the proposers on this RFP solicitation, PSS should also institute the same procedures for other schools on Saipan that may be affected by the results of the reevaluation.

Section 5-102(9) of the PSSPR provides that the appellant, any interested party who submitted comments during consideration of the protest, the Commissioner of Education, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than ten (10) days after the basis for reconsideration is known or should have been known, whichever is earlier.

ORIGINAL SIGNED

Leo L. LaMotte
Public Auditor, CNMI

January 8, 1997